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## REPRESENTATION IN MEDIEVAL CANON LAW

KENNETH PENNINGTON\*

Brian Tierney wrote finely about *repraesentatio* in the medieval councils of the West some twenty years ago.<sup>1</sup> He pointed out that *repraesentatio* could have three different meanings:<sup>2</sup>

The first is *symbolic representation or personification*, as when a whole community is taken to be figuratively present in the person of its head. . . . The second meaning of our term can be defined as *mimesis*. Here an assembly is considered to represent a whole society because it faithfully mirrors in its composition all (society's) varied elements. . . . The third meaning of 'representation' is *delegation or authorisation*.

The last item on this list, jurisprudential concept of "representatio" as agency is, perhaps, one of the most important contributions that the medieval jurists of the *Ius commune* made to Western legal thought. As Tierney, Post, Queller, Congar, and others have pointed out, the development of the juristic concept of agency during the twelfth and thirteenth centuries had a profound effect on medieval institutions.<sup>3</sup>

Tierney's definition provides us with a good starting point for an analysis of representation and agency in medieval canon law. Although all his definitions are important for the history of conciliarism, the jurists of the *Ius commune* had a fourth general concept (rather than a definition) for representation that can be found in their jurisprudence that dealt

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<sup>1</sup> "The Idea of Representation in the Medieval Councils of the West," *Concilium* 187 (1983) 25–30. The author thanks Richard Kay, who read a draft of this article and made a number of helpful suggestions.

<sup>2</sup> *Concilium* 187 (1983) 25.

<sup>3</sup> Gaines Post, "Plena potestas and Consent in Medieval Assemblies: A Study in Romano-canonical Procedure and the Rise of Representation, 1150–1325," *Studies in Medieval Legal Thought: Public Law and the State, 1100–1322* (Princeton: Princeton University Press, 1964) 91–162, especially 102–109. Donald E. Queller, *The Office of Ambassador in the Middle Ages* (Princeton: Princeton University Press, 1967) 25–59. Yves M.-J. Congar, "Quod omnes tangit, ab omnibus tractari et approbari debet," *Revue historique de droit français et étranger* 35 (1958) 210–259. See most recently the discussion of Richard Kay, *The Council of Bourges: A Documentary History. Church, Faith and Culture in the Medieval West*. (Aldershot-Burlington: Ashgate Publishing, 2002) 94–104.

with the governance of a corporation. The first body that the jurists of the *Ius commune* examined in detail was, not surprisingly, the cathedral chapter. When they discussed the relationship between the bishop and his chapter, they created a jurisprudence of corporate thought that incorporated a head, a body, and an institution, the cathedral chapter. Their jurisprudence created and established norms that regulated the relationship between the members of the corporation and dealt with the problems that could arise from conflicts between the members. Perhaps most importantly for our consideration, the jurists conceived of the chapter as a body that also represented a geographic unit, the diocese. As Tierney pointed out fifty years ago, they later applied that model to the entire Church. In the eyes of theologians and jurists, the Church was one body that represented the *congregatio fidelium*.<sup>4</sup> Later, as papal power evolved, the pope's body came to represent the Church as well. In a drawing by Opicino de Canistris the pope is identified as the "body of the Church."<sup>5</sup>

The development of the diocese as a juridical unit that represented a "Christian territory" was a long and slow process. In the Carolingian world a bishop's jurisdictional authority was defined far more by the networks of personal and familial connections than by the territory over which he ruled. We may compare the ecclesiastical world to the secular authority. Princes ruled over people and regions rather than over territories, and bishops imitated secular rulers in their conceptions of their power and authority.<sup>6</sup> Although we cannot imagine these "communities" as territorial in its modern meaning, during the next three centuries, geographical boundaries began to replace personal and familial relationships in the secular and ecclesiastical worlds. Princes ruled states not communities. Power became institutionalized.<sup>7</sup>

We can see these changes in the secular world through the names these communities gave to their lords. The kings of France gradually evolved

<sup>4</sup> Brian Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism* New Enlarged Edition.; Studies in the History of Christian Thought, 81 (Leiden-New York-Cologne: Brill, 1998) 121–129.

<sup>5</sup> Agostino Paravicini-Bagliani, *The Pope's Body*, translated by David S. Peterson (Chicago-London: University of Chicago Press, 2000) 71. See also Wilhelm Imkamp, *Das Kirchenbild Innocenz' III. (1198–1216) Päpste und Papsttum* 22 (Stuttgart: Anton Hiersemann, 1983) for a discussion of the theology of papal power during the formative period of Innocent III's pontificate.

<sup>6</sup> "Historians of early medieval Europe have emphasized this aspect of kingship in recent years. See, for example, Janet Nelson's remarks in *Charles the Bald*. The Medieval World. (London-New York: Longman, 1992) 41–74.

<sup>7</sup> For a fine series of essays on the problem of power, see *Cultures of Power: Lordship, Status, and Process in Twelfth-Century Europe*, ed. by Thomas N. Bisson. The Middle Ages. (Philadelphia: University of Pennsylvania Press, 1995).

from the *Rex Francorum* to *Rex Franciae*. The kings of England from *Rex Anglorum* to *Rex Angliae*. In the ecclesiastical world, papal titles reflected the popes' gradual imperial dominance of the Church with titles like *vicarius Christi* and the Roman Church assumed the title *mater omnium ecclesiarum*.<sup>8</sup>

In the beginning of the eleventh century, bishoprics began to be called *patriae*. Clerics could be considered to be "citizens" of the *patria* by ordination; laymen by birth. Clerics could not or should not travel outside the diocese without *litterae formatae* that might be seen as a very early form of passport. During the same time, the *civitas* of the diocese, the episcopal see, became more and more like a capital city. Again a comparison to the secular world is instructive. In the tenth and eleventh centuries kings, princes, dukes, counts, and other temporal rulers traveled through their domains on annual treks. Their territories were defined by the places where they exercised lordship and where their subjects owed them hospitality. There was little distinction made between the peripheries and the centers of power and authority.

Bishops, however, were the first rulers in Europe to transform their sees into capital cities. The bishop occupied his *sedes* in a specific geographical location much earlier than any secular ruler identified his rule with a particular place within his domains. This happened primarily during the eleventh and twelfth centuries. There are stone and mortar witnesses to this development. It is not by chance that the great building projects of Europe in the eleventh and twelfth centuries were not secular princely palaces but great palaces of worship that represented Christian power, episcopal authority, and urban pride throughout Europe. Bishops not only constructed great houses of worship but also buildings to house themselves and their chapters of canons and in which the affairs of the chapter, juridical and economic, could be conducted.

Since episcopal power was secular and ecclesiastic, the centralization of the bishops' authority brought them in conflict with secular rulers. This part of the story is well known. In Italy, Germany, France, and England, bishops struggled with the nobility and the rising merchant classes to maintain their jurisdictional rights within the city and in the surrounding countryside. In the tenth and eleventh centuries bishops were successful in establishing a "sacral space" in which the bishops' authority was dominant. They established a ring of churches and other ecclesiasti-

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<sup>8</sup> The following paragraphs are taken from the author's essay, "Bishops and their Dioceses" *Folia Canonica* 5 (2002) 7–17.

cal institutions around the cathedral church. Bishops became princes of small territorial states in every sense of the word, "territorial state."

These developments are reflected in the public liturgy of bishops' ascension to power and in their deaths. At their election, bishops entered their sees accompanied by great processions and were installed into their offices with liturgical ceremonies that proclaimed their ascension to power. When they died their bodies again entered the city with ceremony and pomp that imitated their arrival.<sup>9</sup> As Timothy Reuter has observed: The bishops possessed "the symbols of state. Bishoprics were small states with everything that corresponds to our conception of the state."<sup>10</sup>

The canonists began to define the juristic relationship between the bishop and his chapter in the twelfth century. The bishop, his chapter, and the diocese were the basic building blocks of the Church and provided a model of the governance of Church for the medieval Church. Brian Tierney recognized this fifty years ago. In his groundbreaking book on conciliar theory, he devoted two chapters to medieval corporate theory.<sup>11</sup> In those chapters he parsed the relationship between the bishop and his chapter. He demonstrated that the canonists defined the bishop's juridical role in the chapter more precisely during the thirteenth century. They also laid out the chapter's juridical relationship to the bishop in great detail. What Tierney did not demonstrate is how deeply and widely these corporate ideas spread throughout all levels of society. That would have been another book altogether.

Tierney did illustrate the complicated juridical relationships between the bishop and his chapter. By the end of the thirteenth century the jurists recognized that the bishop could sit in his chapter *ut prelatus* and/or *ut canonicus*. He acted *ut prelatus* when he dealt with matters that *de iure communi* belonged to his authority alone. Only in these matters could the bishop act contrary to the wishes of other members of the corporation.<sup>12</sup>

<sup>9</sup> Timothy Reuter, "Ein Europa der Bischöfe: Das Zeitalter Burchards von Worms," *Bischof Burchard von Worms 1000–1025*, ed. Wilfried Hartmann. Quellen und Abhandlungen zur Mittelrheinischen Kirchengeschichte 100. (Mainz: Gesellschaft für Mittelrheinische Kirchengeschichte, 2001) 1–2, 17. For the late Middle Ages see J. Jeffrey Tyler, *Lord of the Sacred City: The "Episcopus exclusus" in Late Medieval and Early Modern Germany*. Studies in Medieval and Reformation Thought, 72. (Leiden-Boston-Cologne: Brill, 1999).

<sup>10</sup> Reuter, "Ein Europa der Bischöfe: Das Zeitalter Burchards von Worms," 5.

<sup>11</sup> Tierney, *Foundations* (ed. 1998) 98–140.

<sup>12</sup> *Ibid.*, 106–107, where he discusses Hostiensis.

The development of the bishopric into a corporate unit that was governed by a bishop and his chapter of canons and that represented the Christians who inhabited the territorial diocese was a major development within the twelfth- and thirteenth-century Church. In the early Middle Ages bishops exercised their authority and jurisdiction unfettered by any formal constitutional structures. By the thirteenth century, a bishop's power and the exercise of his office was limited by a new conception of the bishop's juridical personality that embraced the joint authority of the bishop and the cathedral chapter.<sup>13</sup>

In the period between ca. 1180 and 1300, the canonists generally concurred that the bishop and chapter together constituted the basic administrative unit of the diocese. The exercise of authority within a diocese became in some respects more authoritarian. The canons of the cathedral chapter usurped whatever rights the lower clergy had exercised in the election of bishops and in the running of the diocese. A coalition between the bishop and his chapter spoke for the people and the clergy of the entire diocese. To describe this new juridical entity, the canonists worked out corporate theories that they applied to a wide range of institutions.<sup>14</sup> In canonistic thought, the relationship of the bishop and the cathedral chapter divides into three categories: what the bishop can do in the name of the Church; what the chapter may do without the consent of the bishop; and what the bishop and chapter ought to do together.<sup>15</sup> The canonists limited both the bishop and chapter considerably in what they could do alone. Normally a bishop and chapter had to alienate property, confer benefices and offices, ordain priests, and judge cases in the episcopal court jointly. One canonist, Johannes Teutonicus, asked whether the consent of the parish priests was necessary in some cases, a question that may still have been asked by recalcitrant conservatives in the early thirteenth century. In the late twelfth century Huguccio and Laurentius thought that in some cases parish priests ought to be consulted by the

<sup>13</sup> Jean Gaudemet, *Le gouvernement de l'église à époque classique*, 2: *Le gouvernement local*, Histoire du Droit et des Institutions de l'Église en Occident 8.2. (Paris: Éditions Cujas, 1979) 55–102; idem, *Les élections dans l'Église latine des origines au XVIe siècle*. Institutions-Société-Histoire. (Paris: Lanore, 1979).

<sup>14</sup> Kenneth Pennington, "La loi: Loi, autorité législative et théories du gouvernement, 1150–1300," in *Histoire de la pensée politique médiévale*, ed. James Henderson Burns (Paris: Presses Universitaires de France, 1993) 419–427 (revised version of an essay published in *The Cambridge History of Medieval Political Thought c.350–1450* (Cambridge: Cambridge University Press, 1988).

<sup>15</sup> Tierney, *Foundations* (ed. 1998) 113–114, makes this point very well.

bishop and chapter. Johannes and the later canonists were not, however, inclined to let parish priests share in the governance of the diocese.<sup>16</sup>

If the participation of the entire clergy in the governance of the diocese represented the old world (a world of mimesis?), we can discern a developing tension in canonistic electoral theory between the rights of the local cathedral chapter and its corporate prerogatives and the expanding claims of papal power. Electoral theory is particularly important for understanding the relationship of the person of the bishop and his territorial domain, his diocese. For centuries bishops had been local sons of the local church. Popes, however, began to claim the prerogative to appoint bishops to any diocese in Christendom. Consequently, some bishops gradually became strangers in strange lands during the thirteenth and fourteenth centuries. They were no longer native sons; they were not even committed to a stable, monogamous marriage.<sup>17</sup> We can see in the jurisprudence of thirteenth-century electoral theory a reflection of the old and new order of episcopal power.

The key to the canonists' views on election is their opinions on what constitutes a numerical majority in an election (an issue that will reappear in the writings of fifteenth-century conciliarists). The canonists used the term *maior et sanior pars* to describe a majority of the electors in a corporation. The *maior et sanior pars* was not a numerical majority—although it could be—but was the most important part of the corporate body. Geoffrey Barraclough wrote optimistically that “it is striking enough that the church had the wisdom to reject the democratic fallacy of ‘counting heads,’ and to attempt an estimate of the intelligence and enlightened good faith of the voters.”<sup>18</sup> What may have seemed wise in the context of 1934 does not resonate as well today. Nonetheless, Barraclough's generalization is off the mark for the Middle Ages because the Church did not have the wisdom to reject the fallacious reasoning of ma-

<sup>16</sup> Johannes Teutonicus to C.12 q.2 c.73 v. *consensum*: “Quero de quorum clericorum consensum hoc intelligas, an de clericis episcopalis ecclesie uel de clericis parochie illius? Respondeo de clericis cathedralis ecclesie, nam consensus clericorum ecclesie cathedralis circa ordinem et dispositionem clericorum <requiritur> (Admont, Stiftsbibliothek 35, fol. 166v).”

<sup>17</sup> On the growing papal power to appoint bishops and often to transfer them to wealthier and more important sees, see Kenneth Pennington, “Bishops and their Dioceses,” *Folia canonica* 5 (2002) 7–17. Also idem, *Pope and Bishops: The Papal Monarchy in the Twelfth and Thirteenth Centuries* (Philadelphia: University of Pennsylvania Press, 1984) 75–114.

<sup>18</sup> “The Making of a Bishop in the Middle Ages,” *The Catholic Historical Review* 19 (1933–1934) 275–319 at 277.

jority rule in the governance of cathedral chapters until the first half of the thirteenth century. In the case of papal elections the Church established and continuously reaffirmed the principle that a majority was needed to elect a pope. The double papal election of 1159 had demonstrated to the canonists the dangers of rejecting democracy. The papacy and the canonists quickly concluded that elections based on the principle of majority rule avoided schism and fostered stability. At the Third Lateran Council of 1179 a conciliar canon established the rule that a pope-elect must have the consent of a two-thirds majority in the college of cardinals.

In the early thirteenth century Johannes Teutonicus propounded a theory of election that advocated a clear numerical majority in ecclesiastical elections.<sup>19</sup> But Johannes was one of the last of the Old School. His theory was rejected by Bernardus Parmensis and, most importantly, by Pope Gregory IX, who stated in the decretal, *Ecclesia vestra*, that the *maior et sanior pars* could not always be the numerical majority.<sup>20</sup> The most interesting aspect of Johannes' electoral theory for our purposes is his views on electing an *extraneus*, a foreigner, as bishop. Until the twelfth and thirteenth centuries, most bishops were local men. Although Johannes was a fervent democrat in ecclesiastical elections, he was a committed local oligarch when an ecclesiastical corporation wanted to elect an *extraneus*. Johannes may have been reacting to the increasing presence of foreign shepherds among local flocks. He believed that an *extraneus* could be elected only if there were no worthy candidates to be found locally, and only if the election were almost unanimous. Almost unanimous in this case means all but one. If the chapter elected an *extraneus* but two canons favored a local candidate, the two canons become the *maior et sanior pars* no matter how many canons voted for the other candidate.<sup>21</sup>

Johannes' electoral theory reflects his conviction that foreign shepherds should not care for local flocks. He believed that an *extraneus* could be elected only with great difficulty, and he believed that even the pope could not provide a bishop to an unwilling flock. Johannes rejected the constitutional structure of the Church that was slowly evolving during his lifetime.

<sup>19</sup> Johannes Teutonicus to 3 Comp. 1.6.7 (X 1.6.22) v. *solum plures* (ed. Pennington, Vatican City, 1981) 59.

<sup>20</sup> X 1.6.57.

<sup>21</sup> Johannes Teutonicus to 4<sup>th</sup> Lat. c.23 (4 Comp. 1.3.8 [X 1.6.41]) v. *ipsius quidem ecclesie* (ed. García y García, Vatican City, 1981) 210–211.



Johannes Teutonicus was in a minority. All the later canonists agreed that the cathedral chapter could elect an *extraneus* if the bishop had been elected by the *maior et sanior pars*. Johannes, the old conservative, conceived of the Church as being a local institution, serving local interests, and controlled by local people. In general his ecclesiology emphasized local rights that were firmly located in the cathedral chapter. The model of ecclesiastical governance for the diocese that became the accepted norm in canon law, however, emphasized the authority of the bishop to conduct the affairs of the bishopric with the support of the *maior et sanior pars* of his cathedral chapter. The bishop was the prince of an oligarchy.

The canonists also considered the possibility that the bishop or a prelate might fail in his duties and obligations. Johannes and the canonists developed the doctrine that when the prelate was negligent his canons could make good his failure. Two chapters in Gratian's *Decretum* led the canonists to discuss this issue, a letter of Pope Gregory the Great and a conciliar canon.<sup>22</sup> Johannes Teutonicus wrote succinctly in his Ordinary Gloss to the *Decretum* that was read for centuries afterwards:<sup>23</sup>

This chapter is an argument that if a prelate does not want or neglects to do what he ought to do, his subjects ought to rectify his failings and vice-versa. . . . It seems in these matters that an "ecclesiastical admonition" is not necessary.

His comment to the conciliar canon underlined his point with a reference to a canon from the Third Lateran Council:<sup>24</sup>

Therefore just as superiors remedy the defects of inferiors, so too inferiors rectify the failings of superiors.

Huguccio's extensive commentary on the question, as usual, gives us a more detailed insight into the thinking of the jurists. He argued that cler-

<sup>22</sup> D.89 c.2 and C.9 q.3 c.3. Gratian added both chapters to his final version of his *Decretum*.

<sup>23</sup> Gloss to D.89 c.2 s.v. *omnis clericus*: "Argumentum quod si prelatus non uult uel negligit facere ea quod debet, ea debent suppleri per subditos e econuerso, arg. infra ix. q.iii. Cum simus (c.3) et uidetur quod in talibus non sit in ecclesia ammonitio, ut extra.iii. de supplenda negligentia prelati, Licet [4<sup>th</sup> Lat. c.23 (4 Comp. 1.3.8 [X 1.6.41]). Arg. contra extra iii. de conces. preb. non uac. Quia (MS: Quandoque) [3 Comp. 3.8.2 (X 3.8.5)] (Admont, Stiftsbibliothek 35, fol. 82v)."

<sup>24</sup> Gloss to C.9 q.3 c.3 s.v. *episcopis*: "Ergo sicut superiores inferiorum, sic inferiores superiorum suppleant defectum, ut extra. de conces. preb. et eccles. non uac. Nulla (1 Comp. 3.8.2 [X 3.8.2 = 3<sup>rd</sup> Lat. c.8]) et lxxxix. di. Volumus (c.2) (Admont, Stiftsbibliothek 35, fol. 144v).

ics who are inferior or equal to negligent prelates can correct them solely on the authority of the conciliar canon. This authority is sufficient for all matters except those like the translation or deposition of bishops that require the authority of a higher prelate—in these cases the pope. Nevertheless, and here Huguccio articulated a norm with which almost every jurist would agree for the next three centuries, when inferior prelates move to correct the negligence of superiors, they should seek the authority of higher prelates.<sup>25</sup>

The cathedral chapter became a larger part of ecclesiastical governance in the early thirteenth century. When he convened the Fourth Lateran Council, Pope Innocent III instructed bishops to inform members of their chapters to “send good men to the council.”<sup>26</sup> The chapters were not shy about asserting their new rights to participate in councils. They quickly claimed the right to be represented by procurators and through these representatives to be voting members of local synods.

Archbishops and bishops were not universally happy with the claims of chapters, and the issue was joined soon after the Fourth Lateran Council. In 1216 the archbishop of Sens refused to permit representatives of the cathedral chapters in Sens to participate in a provincial synod. The chapters appealed to Pope Honorius III. The pope supported their claim decisively in the decretal *Etsi membra*. The pope’s arenga was a stirring

<sup>25</sup> Huguccio, *Summa*, D.89 c.2 s.v. *eligant eos quorum (sic)* (Vat. lat. 2280, fol. 80v, Klosterneuburg, Stiftsbibliothek 89, fol. 102r, Lons-le-Saunier, Archives departemenales du Jura, 16, fol. 108r): “Ego autem credo quod de his quibus expressum est in canone ut minores uel pares faciant si maiores uel pares [uel pares *om.* L] fuerunt negligentes sufficiat sola auctoritas canonis, arg. in concilio Romano Cum in cunctis, Nulla, et ix. q.iii. c. Cum simus (c.3), uersu ibi ‘auctoritate propria’, licet illud possit [possint L] intelligi in alio casu et hic, et di. lxxv. Si forte, nisi expresse contineatur in canone quod auctoritas maioris ibi debeat requiri, ut di. c. Quoniam. In his autem de quibus canon nichil statuit, credo exigendam auctoritatem maioris si minores aduersus eos aliquid debeant facere quod alias ad maiores spectat. Similiter credo exigendam auctoritatem maioris [si minores—auctoritatem maioris *om.* VK] et siue a maiore siue a minore ubi aliquid est faciendum contra maiores uel minores uel pares quod generaliter exigit auctoritate maioris sicut est depositio episcoporum uel mutatio. Et hic ad quid enim canones mandarent ut minores negligentiam maiorum supplerent si semper esset exigenda auctoritas maioris, nam ea interueniente licitum erit etsi canon specialiter hoc non [hoc L] mandet.”

<sup>26</sup> See the excellent discussion of Kay, *Council of Bourges*, 97–101. Until relatively late the canonical tradition attributed *Etsi membra* to Pope Innocent III; see Eric Waldram Kemp, *Counsel and Consent: Aspects of the Government of the Church as Exemplified in the History of the English Provincial Synods* (London: S.P.C.K. 1961) 43–44, who also gives a brief survey of canonistic commentary on the decretal.

sermon on the corporate body of the Church and the interdependence of each individual member.<sup>27</sup>

Although the members of Christ's body, which is the Church, do not have one function but diverse ones . . . He placed each person in that body so that the members constitute one body. The eye cannot say to the hand "I don't need what you do" or the head to the feet, "you aren't necessary to me." Still more important, the weaker members of the body seem to be necessary.

Honorius instructed the archbishop and his suffragans that he intentionally wrote his *arenga* for them as an admonition. The archbishop had denied representatives (*procuratores*) of the cathedral chapters admittance to comprovincial councils in which matters touching their interests were treated. The archbishop had defended his position in a letter to the pope.<sup>28</sup> Honorius, however, did not find his reasons, whatever they were, convincing.<sup>29</sup>

We and our brothers the cardinals were in complete agreement that those chapters ought to be invited to such councils and their nuncios (*nuntii*) ought to be admitted to the business of the council, especially those about matters that are known to concern the chapters.

Further, Honorius concluded, the archbishop should follow the mandate of this decision in the future. "When the head gives the members their due the body shall not experience the ravages of schism but will remain whole in the unity of love."<sup>30</sup>

<sup>27</sup> "[Translation based on Richard Kay's] "Etsi membra corporis Christi, quod est ecclesia, non omnia unum actum habeant set diuersos . . . prout voluit in ipso corpore posuit unumquodque, ipsa tamen membra efficiunt unum corpus, ita quod non potest oculus dicere manui "tua opera non indgeo" aut caput pedibus "non estis michi mecessarii," set multomagus que videntur membra corporis infirmiora esse necessaria sunt." Kay edits and translates the original text on cited above on pp. 541–543. Tancred included it in *Complatio quinta* 3.8.1 and Raymond de Peñafort placed it in the Gregoriana, X 3.10.10.

<sup>28</sup> Ibid.: "Hec idcirco premisimus quia provincie vestre capitula cathedralia suam ad nos querimoniam transmiserunt quod vos procuratores ipsorum nuper ad comprovinciale concilium convocatos ad tractatum vestrum admittere nolulistis, licet nonnulla soleant in huiusmodi tractari conciliis que ad ipsa noscuntur capitula pertinere . . . et intellectis nichilmominus litteris quas nobis super eodem curastis negotio destinare."

<sup>29</sup> Ibid. "Nobis et eisdem fratribus nostris concorditer visum fuit ut ipsa capitula ad huiusmodi concilia invitari debeant et eorum nuntii ad tractatus admitti, maxime super illis que capitula ipsa contingere dinoscuntur."

<sup>30</sup> Ibid. "Ideoque volumus et presentium vobis auctoritate mandamus quatinus id decetero sine disceptatione servetis . . . Quatinus capite membris et membris capiti digna vicissitudine obsequentibus corpus scismatis detrimenta non sentiat set connexum in caritatis unitate consistat."

Kay calls Honorius' decretal "a landmark in the development of representative government."<sup>31</sup> He is absolutely right. The canonists immediately expanded the right to attend provincial councils by representatives of cathedral chapters into a more general right of persons whose interests were affected by the business of the council. During the thirteenth century provincial synods included representatives of cathedral chapters as a matter of course.<sup>32</sup> *Etsi membra* became a key legal justification that persons and ecclesiastical institutions had the right to send representatives to assemblies that dealt with issues pertaining to their interests and that they, through their representatives, had the right to consent to new legislation.

Honorius III's decretal became a part of canon law, and canonists commented on it for the next four centuries. Shortly after Honorius promulgated *Compilatio quinta* in 1225, Jacobus de Albenga alluded to the fundamental but unarticulated principle that lay at the heart of *Etsi membra*, a norm that was decisive when the pope and his cardinals decided to support the canons and not their archbishop and bishop.<sup>33</sup> Honorius, he wrote, embraced the right of cathedral chapters to participate in councils "because what touches them ought to be decided by them."<sup>34</sup> In the middle of the thirteenth century Bernardus Parmensis explicitly quoted the maxim in his Ordinary Gloss to the decretal that Jacobus alluded to: What touches all ought to be approved by all (*Quod omnes tangit ab omnibus approbari debet*).<sup>35</sup> Jurisprudential norms of the *Ius commune* were powerful tools for shaping institutions in medieval society. *Etsi membra* is a splendid example of how a legal principle could inform a judicial decision and regulate the rules governing the calling of a council. The logic of the decretal's argument could be understood as meaning that any council should invite persons who were not normally present in the deliberations of the council when it dealt with matters touching their inter-

<sup>31</sup> Ibid. 538.

<sup>32</sup> See the work of Orazio Condorelli, *Principio elettivo, consenso, rappresentanza: Itinerari canonistici su elezioni episcopali, provvisori papali et dottrine sulla potestà sacra da Graziano al tempo della crisi conciliare (secoli XII-XV)* I libri di Erice, 32. (Rome: Il Cigno, 2003).

<sup>33</sup> Post, *Studies in Medieval Legal Thought*, 234–235, connected "Quod omnes tangit" and *Etsi membra* almost sixty years ago.

<sup>34</sup> Jacobus de Albenga to 5 Comp. 3.8.1 s.v. *contingere* (Admont, Stiftsbibliothek 22, fol. 295r and Cordoba, Biblioteca de Cabildo 10, fol. 327v): "quia quod eos tangit ab eis comprobari debet, ut liiii. di. c.i. et lxvi. c.i et viii. q.i. Licet (c.15)." See note 3 above for literature discussing this norm of medieval jurisprudence.

<sup>35</sup> Bernardus Parmensis to X 3.10.10 s.v. *contingere*: "Et merito quia quod omnes tangit ab omnibus debet probari."

ests. Jacobus de Albenga saw the logical implications of the decision and explained that although lay persons were not normally invited to church councils, if the issues that were to be decided by the council touched their interests, they too should be summoned. Such issues could be matters of faith and of marriage<sup>36</sup>

Shortly after the Decretals of Gregory IX were promulgated in 1234 Vincentius Hispanus glossed *Etsi membra* and noted that when someone was summoned to a council, the invitation to a council became an acquired right (*ius*), because, quoting Ovid, "it is more evil to eject than not to admit guests (Ovid, *Tristia* 5.6.13)."<sup>37</sup> He followed Jacobus' comments on lay participation by agreeing that laymen should be consulted on matters concerning matrimony and matters of faith but added religious festivals to the list.<sup>38</sup> Vincentius was not, however, completely comfortable with the lower clergy's participation in councils. He glossed the phrase "especially (*maxime*) about those matters that are known to concern the chapters (*maxime super illis que capitula ipsa contingere dinoscuntur*)" by noting that *maxime* had an equivocal meaning. In this case, he argued it meant "only." Consequently he concluded that the lower clergy could be admitted to a council on a contingency basis; and if they are present and if they see that their rights have been taken away, they may appeal.<sup>39</sup> Vincentius also cited "Quod omnes tangit" as the norm that justified Honorius' decision. Although he limited lay participation, he expanded the scope of *Etsi membra* by applying it to the procedural rules that regulated disputes between a bishop and his cathedral

<sup>36</sup> Jacobus de Albenga to 5 Comp. 3.8.1 s.v. *contingere* (Admont, Stiftsbibliothek 22, fol. 295r): "Laici vero huiusmodi conciliis interesse non debent nisi specialiter uocarentur, ut lxiii. Adrianus, in fine (c.2) uel nisi specialiter tractaretur causa fidei, ut xcvi. di. Vbinam (c.4) uel nisi tractaretur de matrimonio, tunc enim cum tales cause eos tangant possunt interesse, ut xxxv. q.v. Ad sedem (c.2). jac." Bernardus repeated Jacobus' gloss in his Ordinary Gloss.

<sup>37</sup> Vincentius Hispanus to X 3.10.10 s.v. *inuitari* (Paris, Bibliothèque nationale lat. 3967, fol. 127v and Paris, Bibliothèque nationale lat. 3968, fol. 106r): "Arg. ex inuitatione acquiritur ius, unde turpius eicitur <quam non admittitur hospes> etc. supra de iureiurando Quemadmodum (X 2.24.25, where Ovid is cited)."

<sup>38</sup> Ibid.: "Et notatur laici non debent interesse conciliis nisi specialiter uocentur, lxiii. di. Adrianus (c.2), uel nisi tractaretur causa fidei, xcvi. di. Ubinam (c.4) uel nisi [tractaretur—uel nisi *om.* 3967] tractaretur de matrimonio, xxxv. q.ii. Ad sedem (c.2), uel nisi tractandum sit de festiuitatibus, de con. di.iii. Pronunciandum (c.1)."

<sup>39</sup> Ibid. s.v. *maxime*: "idest 'tantum.' Vel debent admitti ad omnia generalia, maxime ad contingentia aliquid; uel intersint omnibus ut si uiderint iuri suo detrahi ualeant appellare, supra de offit. del. Super eo (X 1.29.15) uinc."

chapter. If the bishop and chapter disagreed about tithes the testimony of outsiders may be taken into account in order to settle the conflict.<sup>40</sup>

Not every pope was as sympathetic to Honorius III's conception of the Church as an interdependent body with mutual rights. As Brian Tierney has noted many years ago:<sup>41</sup>

The canonists' tendency to personify the individual churches, to discuss problems of their internal structure in terms of anthropomorphic imagery, did not influence the actual content of their doctrines so much as is sometimes supposed. The head-and-body metaphor could so easily be adapted to support any constitutional solution.

Tierney demonstrated that Pope Innocent IV, who was also a great jurist, had an unitary vision of the corporation, the papacy, and the Church, and he conceived each as "*regimen unius personae*."<sup>42</sup> When Innocent came to gloss Honorius' *Etsi membra*, he did not want to deal with a text with which he had so little sympathy. "Repeat what we have said in our commentary above on the canon of the Fourth Lateran Council *Grave*."<sup>43</sup> And if his readers or listeners did as they were instructed, they learned again the pope's uncompromising "strict authoritarianism."<sup>44</sup> In *Grave* Pope Innocent III had decreed that prelates and chapters who are convicted of bestowing ecclesiastical benefices upon unworthy candidates more than two times should lose their authority to confer benefices. Provincial councils were to investigate and judge these cases.<sup>45</sup> First Innocent dis-

<sup>40</sup> Ibid. s.v. *contingere*: "Quia quod omnes tangit ab omnibus etc. viii. q.i. Licet (c.15), ff. de minor. In cause § Causa et l. Etiam § ult.(Dig. 4.4.13(14).1. and 4.4.45) ff. de re iudicat. l. De unoquoque (Dig. 42.1.47), ff. de aqua plu. ar. In concedendo (Dig. 39.3.8), C. de communi agro deserto Quicumque, in fine, lib.xi. (Cod. 11.59[58].3). Et est argumentum quod si episcopus uult cum capitulo suo conferre super decima in qua [quo 3968] est controversia inter episcopum et eos, potest aliunde testes intrinsecos uel tabelliones per quos possit testificari iura sua, infra de sent. excomm. Sacro (X 5.39.48), supra de probat. Quoniam contra falsam (X 2.19.11 et c.iii. Quippe. uinc."

<sup>41</sup> Tierney, *Foundations* (ed. 1998) 95.

<sup>42</sup> Tierney discusses the corporate theories of Innocent and Hostiensis in *Foundations* (ed. 1998) 98–108. See also the important study of Alberto Melloni, *Innocenzo IV: La concezione e l'esperienza della cristianità come regimen unius personae* (Testi e ricerche di scienze religiose, nuova serie 4; Genoa, 1990) especially 165.

<sup>43</sup> Innocent IV, *Commentaria* to X 3.10.10 s.v. *capitula* (Venice 1570) 460: "Repete quod diximus supra de prebend. cap. Grave (X 3.5.29)."

<sup>44</sup> Tierney, *Foundations* (ed. 1998) 98.

<sup>45</sup> X 5.5.29 (4<sup>th</sup> Lat. c.30). For an English translation of the conciliar canon, see *Decrees of the Ecumenical Councils*, 1: *Nicaea I-Lateran V*, 2: *Trent-Vatican II*, ed. Norman P. Tanner. (London-Washington, D.C.: Georgetown University Press, 1990) 1: 249.

tinguished between episcopal and provincial councils. He noted that only bishops of the province must be summoned to the provincial council that would judge these cases of irresponsible electors but that abbots, priests, and the clergy of the city should be summoned to episcopal councils.<sup>46</sup> Innocent conceded that cathedral chapters ought to be summoned to provincial councils when matters that concerned them were treated. Otherwise they were not admitted to provincial councils unless it were a matter of "honesty" or "counsel."<sup>47</sup> Advice, however, was very different from a legal right to participate in conciliar affairs. Innocent's silences speak even more clearly about his conception of the Church than what he does say. He completely ignores the earlier discussions from Jacobus to Vincentius about the rights of laymen, cathedral chapters, and others to participate in councils. His vision of his Church did not include shimmering images of representation and consent.

Hostiensis was in many ways the jurisprudential counterpoint to Innocent IV in the thirteenth century.<sup>48</sup> Tierney has shown in great detail that Hostiensis had a much more nuanced conception of the corporate structure of the Church.<sup>49</sup> His commentary on *Etsi membra* illustrates Hostiensis' embrace of the corporate Church. He rejected Vincentius' at-

<sup>46</sup> Innocent IV, *Commentaria* to X 3.10.10 s.v. *provinciali concilio*: "Ad hoc concilium de necessitate vocandi sunt episcopi et non alii . . . et hoc de archiepiscopali sive provinciali concilio. Ad episcopale autem concilium vocandi sunt abbates, sacerdotes, et omnem clerum civitatis et dioecesis convocare debet episcopus. Sunt autem episcopi sic congregati in concilio provinciali loco ordinarii in omnibus causis quae vertuntur inter episcopos et clericos . . . Immo plus dicimus quod iidem episcopi sine concilio sunt ut iudices ordinarii in omnibus causis clericorum quae ad concilium referuntur."

<sup>47</sup> *Ibid.*: "Capitula autem cathedralium ecclesiarum tunc sunt vocanda ad concilium provinciale cum de eorum factis agitur, infra de his quae fiunt a praelat. sine consen. cap. finali (*Etsi membra*, X 3.10.10), alias non nisi de honestate vel propter consilium (concilium ed.), 63 (64 ed.) dist. c. Obeuntibus (c.35)." D.63 c.35 was canon 28 of the Second Lateran Council in which cathedral chapters were ordered to take into account the advice (*consilium*) of *religiosi viri* and not to exclude them from their deliberations.

<sup>48</sup> Kenneth Pennington, "Enrico da Susa, detto l'Ostiense (Hostiensis, Henricus de Segusio o Segusia)," in *Dizionario biografico degli Italiani* 42. (Rome: Istituto della Enciclopedia Italiana, 1993) 758–763 and in English "Henricus de Segusio (Hostiensis)," *Popes, Canonists, and Texts 1150–1550*. Collected Studies Series 412. (Aldershot: Variorum, 1993).

<sup>49</sup> Tierney, *Foundations* (1998 ed.) 98–108. See also the debate about Hostiensis' position on the juridical relationship between the pope and cardinals discussed by Roberto Grison, "Il problema del cardinalato nell'Ostiense," *Archivum Historiae Pontificiae* 30 (1992) 125–157, in which he also summarizes the debate between Brian Tierney and John Watt over this issue..

tempt to restrict the scope of the decretal and noted that *maxime* meant “especially.”<sup>50</sup>

The pope said, “especially” because the cathedral chapter should be present for all things, but especially if there are special matters. You have here an argument that “what touches all ought to be approved by all.”

Cathedral chapters were represented by procurators because it would not be convenient for the entire chapter to be present at a council.<sup>51</sup> He also thought that laymen should be present when the council promulgated canons that touched their interests. They could not vote on the measures; but they could listen to the proceedings—they could not judge or teach in the council. Laymen could seek justice for themselves or others and participate in councils where matters of faith and matrimony were considered. They could not, however, be present when the council was conducting an investigation of clerical crimes.<sup>52</sup>

Two centuries after Hostiensis, Panormitanus, the great jurist and conciliarist of the fifteenth century, had no doubts about the enduring importance and force of *Etsi membra*.<sup>53</sup> Although Innocent IV may have vacillated about whether it were necessary that cathedral chapters should be called to provincial councils, Panormitanus thought their participation

<sup>50</sup> Hostiensis, *Commentaria* to X 3.10.10 s.v. *contingere* (Venice 1580) vol. 3, fol. 48r: “Specialiter, nam generaliter communia omnes tangunt. Et ideo dixit ‘maxime,’ nam et quoad omnia interesse debent, sed maxime quoad specialia, si qua habent. Habes ergo his argumentum quod, quod omnes tangit, est ab omnibus approbandum ut hic.”

<sup>51</sup> Ibid.: s.v. *procuratores*: “ipsorum capitulorum, nam ipsa capitula commode venire non possent.”

<sup>52</sup> Ibid.: “Sed numquid laici admitti debent? Sic in publicatione statutorum ipsos tangentium, ut ipsa audiant, non ut iudicent vel doceant, lxii. di. Docendus (c.2). Et tempore praedicationis haec audire possint, etiam si excommunicati sint . . . et quoad iustitiam petendam vel defendendam . . . maxime ubi de fide agitur ad tuitionem ipsius . . . vel ubi tractatur de matrimonio . . . In ecclesiasticis autem et clericorum correctionibus sunt excludendi.” Hostiensis did not add anything to the second recension of his commentary to *Etsi membra*; see Kenneth Pennington, “An Earlier Recension of Hostiensis’s *Lectura* on the Decretals,” *Bulletin of Medieval Canon Law* 17 (1987) 77–90.

<sup>53</sup> For biographical and bibliographical information about Panormitanus, see Kenneth Pennington, “Nicholaus de Tudeschis (Panormitanus),” *Niccolò Tedeschi (Abbas Panormitanus) e i suoi Commentaria in Decretales*, ed. Orazio Condorelli (Rome: Il Cigno Galileo Galilei, 2000) 9–36. Also published on CD Rom with a digitized text of his *Commentary* on the Decretals of Gregory IX: *Nicholaus de Tudeschis (Abbas Panormitanus) Commentaria in Decretales Gregorii IX et in Clementinas Epistolas*. Edizioni Informatiche (Rome: Il Cigno Galileo Galilei, 2000).



was necessary because “normally there is necessity” for their presence.<sup>54</sup> He maintained that cathedral chapters can appear in a council represented by procurators. Others who must attend councils may not send representatives, but they may send a procurator if compelled by necessity.<sup>55</sup> Panormitanus also argued that *Etsi membra* established that cathedral chapters should always be summoned to provincial chapters.<sup>56</sup>

When Panormitanus discussed the participation of laymen in councils, he framed the question around their presence at general councils. There were, he thought, a number of reasons why laymen could attend a general council. One reason was that they were invited. He then rehearsed the other traditional reasons why laymen could participate: matters of faith and marriage.<sup>57</sup> From these texts, he said, one could formulate a general rule: “whenever a council dealt with matters that touched upon the interests of laymen, they could be present in the council.”<sup>58</sup> He understood, however, that his general principle did not resolve the legal question that Hostiensis had first raised: what exactly was the role and the purpose of laymen in a council? Johannes Andreae had repeated Hostiensis’ suggestion that the role of laymen at councils was to listen, not to judge or to teach. Johannes had added that if they were only present to listen it was not necessary to invite them at all. They could hear about conciliar proceedings in sermons.<sup>59</sup> Whatever Johannes may have

<sup>54</sup> Panormitanus, *Commentaria* to X 3.10.10 (Venice 1582) fol. 164r: “Quinimmo Innocentius vacillat in c. Grave de prebend. (X 3.5.29) numquid de necessitate ista capitula sint vocanda ad concilium prouinciale, sed ego tenui quod sic, et allegavi hunc textum qui optime probat, ut patet per verbum, ‘debeant,’ quod regulariter est necessitativum.”

<sup>55</sup> Ibid. s.v. *procuratores*: “Quod capitula possunt comparere in concilio per procuratores, et hoc ideo quia de facili non possunt per se comparere. Alii vero qui necessario debent comparere personaliter et non per procuratores, nisi in casu necessitatis . . . et sic notatur quod ex causa quis posset comparere in concilio per procuratorem.”

<sup>56</sup> Ibid.: s.v. *maxime*: “quod etiam in negotiis non contingentibus capitula, debent admitti ad tractatum concilii.”

<sup>57</sup> Ibid.: “Ponit tres casus in quibus laicus admittitur ad concilia generalia. Primus casus si specialiter invitetur, et sic intellige glossam in c. Adrianus (D.63 c.2 or c.22). Et notatur bene quia ex hoc poteris solvere contrarium multorum iurium in quibus legitur laicum fuisse admissum ad concilium, ut intelligatur quod specialiter fuerint invitati, non de necessitate. Secundus casus si tractatur causa fidei, Tertius si tractatur de causa matrimoniali, quia matrimonium tangit eos.”

<sup>58</sup> Ibid.: “Ex hoc ultimo casu potes elicere regulam generalem: quod ubicumque in concilio contractarentur negotia tangentia ipsos laicos, poterunt laici interesse concilio.”

<sup>59</sup> Johannes Andreae *Commentaria* to X 3.10.10 (Venice 1581, reprinted Goldbach 1997) fol. 66r, s.v. *in glossa ultima, ibi “tangant”*: “Tunc intererunt ut audiant non ut iudicent vel doceant, 62 di. Docendus (c.2). Sed nec ad illa necesse est eos vocari cum possint postea in praedicationibus publicari, quae fieri possunt illis etiam excommunicatis.”

thought, Panormitanus believed that laymen ought to be admitted to give counsel and to discuss matters, especially if they were learned. In the past the pope had summoned lay jurists and canonists not to listen but to give counsel. He has also summoned kings and secular princes for the same purpose.<sup>60</sup> The sense of the Church as being a body in which members all had individual rights and duties and to which all members had the right to consent to matters that touched their interests was still an important element of canon law in the mid-fifteenth century.

After the age of conciliarism had passed, the Church and canon law changed. By the seventeenth century canonists no longer thought of the Church as an interdependent body. The head-and-body metaphor remained a part of ecclesiological rhetoric but the body's rights and duties atrophied. When Emanuel Gonzalez Tellez († 1649) commented on *Etsi membra*, the issues that occupied canonists from Jacobus de Albenga to Panormitanus were no longer relevant to the governance of the Church.<sup>61</sup> Tellez discussed Pope Honorius' decretal only as an historical text with no relevance for his times.<sup>62</sup>

This is a singular text as one may scarcely find the idea expressed in law that chapters are summoned to provincial councils and

<sup>60</sup> Panormitanus, *Commentaria* to X 3.10.10 (Venice 1582) fol. 164r-164v, s.v. *maxime*: "Inquantum dicit Ioannes Andreae quod debent admitti ut audiant, credo quod admittantur ut consulant et ut materiam tractent, maxime quando sunt periti. Hoc videtur probari 31 q.6 (5 *recte*) Ad sedem (c.2), ubi papa vocavit iuristas laicos et canonistas ad defensionem iurium super illo puncto, non audierent, sed ut consulerent. Ad idem textus pulcher in c. Ad apostolicae, de re iud. lib. 6 (VI 2.14.2), ubi papa pollicebatur se vocaturum ad concilium reges et principes seculares et ecclesiasticas personas, ut cum consilio concilium deponeret. Vocat ergo laicos ut consulant, nec pro nunc ulterius me extendo; dicetur plenius in disputatione." The disputation that Panormitanus referred to is probably one of those that he wrote about conciliar matters. See Pennington, "Nicolaus de Tudeschis" 14–15; and, for a more general discussion of his conciliar thought, see Knut W. Nörr, *Kirche und Konzil bei Nicolaus de Tudeschis (Panormitanus)* Forschungen zur kirchlichen Rechtsgeschichte und zum Kirchenrecht 4. (Cologne-Graz: Böhlau, 1964).

<sup>61</sup> Tellez wrote the last great commentary on the Decretals of Gregory IX. For the few facts we know about him and his works, see Kenneth Pennington, "Sovereignty and Rights in Medieval and Early Modern Jurisprudence: Law and Norms without a State," in *Rethinking the State in the Age of Globalisation: Catholic Thought and Contemporary Political Theory*, ed. Heinz-Gerhard Justenhoven and James Turner. Politik: Forschung und Wissenschaft, 10. (Münster: J.P. Bachem Verlag, 2003) 117–141, at 126–136.

<sup>62</sup> Emanuel Gonzalez Tellez, *Commentaria perpetua* to X 3.10.10 (Venice 1766) fol. 142–143: "Constitutio haec adeo singularis est ut vix in iure expressum reperiatur an evocanda sint capitula suffraganea ad concilium provinciale, ut in eo procuratores suffragium habeant, cum nusquam vel raro eos conciliis adfuisse legamus, nisi in aliquibus conciliis nostrae Hispaniae, praecipueque provinciae Tarraconensis ubi procuratores ipsarum ecclesiarum post abbates subscribunt."

that procurators of suffragan chapters may be present, since never or rarely do we read that they were present in councils. There is some evidence from Spanish councils, especially from Tarragona.

Although Tellez found evidence that chapters were summoned to general councils, this right had been slowly taken away because it had not been observed for many centuries.<sup>63</sup> Consent, advice, counsel, and *Quod omnes tangit* were no longer fundamental norms that governed the body of the Church on the Iberian peninsula.

Perhaps the last great figure to look back on the tradition of representation for cathedral canons and laymen was the great scholar-pope, Pope Benedict XIV (1740–1758). By training he was a jurist, and he wrote a learned, widely read and disseminated, and enormously popular treatise on all aspects of the diocesan synod while he was bishop of Bologna.<sup>64</sup> Canons of cathedral chapters should be invited to provincial synods; but, he noted, they could not be forced to attend. The deputies (*deputati*) have, however, a consultative, not a regular vote on synodal matters. This restriction on their participation had been definitively established in 1596 at Salerno.<sup>65</sup> Laymen could also be summoned. However, Benedict

<sup>63</sup> Ibid.: “Deinde nam si in conciliis generalibus praedicta capitula vocantur ut constat ex actione i. Conc. Chalced. in epistola Imperatoris ad Dioscorum, ubi prohibetur episcopis ne eosdem mittant procuratores qui constituti sunt a capitulis, quanto magis ad concilia provincialia vocari. Sed hoc ius ita observandum paulatim sublatum fuit, ita ut iam pluribus retro saeculis capitula ad concilia provincialia non vocentur.”

<sup>64</sup> Benedictus XIV, *De synodo diocesana libri tredecim*, printed in many editions (The author has not listed editions after 1800): Rome 1748, Ferrara 1753, Rome 1755, Ferrara 1758, Ferrara 1760, Parma 1760, Louvain 1763, Ferrara 1764, Parma 1764, Venice 1765, Madrid 1767, Sine loco 1767, Rome 1767, Augsburg 1769, Naples 1772, Ferrara 1775, Venice 1775, Venice 1777, Madrid 1778, Rome 1783 (a copy at The Catholic University of America was owned by Archbishop of Baltimore John Carroll [1735–1815]), Venice 1792–1793, and also in his *Opera omnia* (12 volumes; Rome, 1747–1751), (15 volumes in 7; Venice, 1788), and (22 volumes; Prato, 1839–1847). On his life see Tarcisio Bertone, *Il governo della Chiesa nel pensiero di Benedetto XIV*. Biblioteca di scienze religiose, 21. (Rome: LAS, 1977). The author offers special thanks to Richard Kay for drawing his attention to Pope Benedict and to this text.

<sup>65</sup> Ibid., Book 3, chapter 4: “Canonicos Ecclesiarum Cathedralium invitandos esse ad Synodum Provinciale, deliberatum fuit in Concilio Provinciali Mechliniensi, celebrato Lovanii anno 1574: “Fuit conclusum et resolutum quod posthac nominatim ad Concilium Provinciale vocabuntur Decani, et Capitula Ecclesiarum Cathedralium.” . . . et cum communi docet Fagnanus in cap. Etsi membra . . . Inviti tamen compelli nequeunt ut interveniant quemadmodum idem Fagnanus prosequitur: “et si Concilio Provinciali intersint, votum mere consultivum, non decisivum, habent, juxta decretum sacrae Congregationis Concilii, in Salernitana Syndo, die 19 Aprilis 1596, lib. 8 decretor. pag. 174: “Capitulorum Deputatos vocem duntaxat consultivum in Concilio Provinciali habere.”

reminded his readers of the wise admonition of Giacomo Pignatelli to all bishops. They should not invite laymen too readily. Invitations that they might have been given because of good will and courtesy over the course of time might turn into a necessity.<sup>66</sup> In the end, however, Benedict did not want laymen in synods. If bishops needed their counsel, they could get it outside the synod. Prelates should not summon laymen without grave and true necessity. If they did, laymen would slowly obtain a right, gained by custom, to attend synods. Remember, he warned, Pignatelli's admonition.<sup>67</sup> Benedict still believed that customary usage could bestow rights. An atavistic remnant of an older jurisprudence, custom as a source of rights in the Church would completely disappear in the modern world.

Finally, Benedict concluded, if laymen were present at the opening of a synod, they should leave before the work of the council would begin. Bishop Odo of Paris in 1198, Bishop Raymond of Rodez in 1298, and, the greatest authority of all, Archbishop Carlo Borromeo of Milan, all expelled laymen from the proceedings as soon as the council went into session.<sup>68</sup> Pope Benedict did not leave much room for the rights of representation in the eighteenth-century Church.

Returning to the thirteenth century, we have a splendid illustration of how profoundly the concept of consent embodied in the legal maxim "Quod omnes tangit" had penetrated into the marrow of other ecclesiastical institutions outside councils in the organization of the early Dominican Order. In 1228 Master Jordan summoned a chapter meeting in Paris. He asked each of the eight provincial priors and two deputed diffinitors

<sup>66</sup> Ibid., Book 3, chapter 9: "Recte nihilominus et opportune Pignatellus consult. 70, tom. 1, (Giacomo Pignatelli 1625–1698) episcopos monet ut caute in hoc se gerant neque nimis faciles se praebeant in laicis ad Synodum invitandis, ne quod ab initio merae voluntatis et urbanitatis fuit, tractu temporis fiat necessitatis." Giacomo Pignatelli, *Consultationes canonicae*. 10 volumes in 6 (Rome: 1668–1697).

<sup>67</sup> Ibid.: "Quantum inter sufficientes causas illos admittendi non posse eam annumerari, quam sacra Congregatio jam rejecit, quod scilicet Episcopos Laicorum consilio indigeat; commode quippe potest eos extra Synodum consulere. Quantum demum cavendum esse Episcopis, ne sine vera et gravi necessitate Laicos ad Synodum arcessant; paulatim enim possent illi, consuetudinis obtentu, jus interveniendi sibi deinceps arrogare, quod jam super de Synodo Provinciali cum Pignatello animadvertimus."

<sup>68</sup> Ibid.: "Hinc Odo, Episcopus Parisiensis, in suis constitutionibus synodalibus, quas anno 1198 condidit, quamvis laicos a praevio ad Synodum apparatu non excluserit, districte tamen praecepit ut ante sessionis initium e Synodi loco repellerentur . . . Idemque anno 1289 faciendum decrevit Raymundus Episcopus Ruthenensis in supra citata epistola Synodica: "In utraque vero die, completo sermone, laici a loco ubi tenebitur synodus expellantur" . . . At Carolus Borromaeus in suis Synodis, quod liberius posset clericorum vitia redarguere, laicos ante sermonem ab ecclesia exire jussit."

from each province to come with full proxy powers: "Every brother should without exception give their assent to them and grant plenary power to them."<sup>69</sup> The corporate body of Dominicans bestowed the full power of agency upon their representatives because "whatever they decided either by creating or by renouncing, or by changing—either by adding or subtracting—will remain permanent and stable."<sup>70</sup> The words in these sentences are redolent with the scent of Roman law's technical terminology that was flowering in the classrooms, courts, and chancelleries of Europe. "*Plena potestas*" was the crucial, central phrase with which people granted agency to their chosen representatives.<sup>71</sup> When a jurist talked about creating law, "*constituere*" was the word he used. "*Destituere*" meant to renounce a legal right or the right to bring suit. "*Mutare*" did not have the same technical meaning, but the jurists almost always chose it when they talked about changing law.<sup>72</sup> "*Firmum et stabile permanere*" or "*firmum et stabile perseverare*" can be found as standard, boiler-plate legal terminology in large numbers of charters, privileges, and laws from the ninth to the twelfth century. In short Jordan's summons imitated and incorporated the legal language and usage of the *Ius commune*. The language took up the vocabulary and the jurisprudence of representation and agency. By the fourteenth century it would become pervasive in the ecclesiastical and secular institutions of medieval Europe. These Dominicans whom Jordan summoned to Paris were proctors who represented the entire order. They had the authority to bind the brothers who selected them by their actions. Their authority to establish rules and

<sup>69</sup> "Fratres omnes vota sua unanimiter transtulerunt, eisdem potestatem plenariam concedentes," A.H. Thomas, *De oudste constituties van de Dominicanen: Voorgeschiedenis, tekst, bronnen, ontstaan en ontwikkeling (1215–1237)*. Bibliothèque de la Revue d'Histoire Ecclésiastique, 42. (Louvain: Dominikanenklooster, 1965) 309. The author warmly thanks John Van Engen for bringing this important piece of evidence to his attention.

<sup>70</sup> "Ibid: "ut quicquid ab ipsis fieret, sive in constituendo sive in destituendo, mutando, addendo vel diminuendo, de cetero firmum ac stabile permaneret."

<sup>71</sup> Post, "*Plena potestas*" (see note 3) is the classic study of this phrase.

<sup>72</sup> At the end of the prologue to the *Constitutiones* the author cited the wording of Pope Honorius III's decretal that promulgated *Compilatio quinta*: "novis emergentibus causis, articulis, casibus et negotiis, de ipsis possit aliquid pro tempore immutari." *Compilatio quinta* began: "Novae causarum emergentium questiones novis exigunt decisionibus terminari," ed. Emilius Friedberg, *Quinque compilationes antiquae* (Leipzig: Bernhard Tauchnitz, 1882, reprinted Graz: Akademische Druck- U. Verlagsanstalt, 1956) 151. For an English translation of Honorius' letter, see Robert Somerville and Bruce Brasington, *Prefaces to Canon Law Books in Latin Christianity: Selected Translations, 500–1245* (New Haven-London: Yale University Press, 1998) 234–235.

norms for their order had a solid and well-established legal foundation—the consent of their constituents. They were representatives.

How did this jurisprudence that governed the diocese, councils, and other institutions in medieval society shape the thought of later conciliar thinkers? It became an accepted norm that a council should consist of representatives from the entire clergy. Further the great conciliar thinkers of the fourteenth and fifteenth centuries lived and breathed in an institution that had become hierarchical and oligarchical. By the time of the Council of Constance patriarchs, cardinals, archbishops, bishops, abbots, priors, doctors of law and theology, and simple priests mingled cheek by jowl.<sup>73</sup> At Constance Gerson proclaimed that the Church, or a general council representing it, can provide direction for a negligent pope. At Basel a few years later, the lower clergy attempted to play an even greater role.<sup>74</sup> Some canonists, like Zabarella, claimed that the college of cardinals with the pope represented the entire Church. This body not only represented the Roman Church but could be said to represent the entire body of faithful.<sup>75</sup> The pope, just like the bishop, could exercise his authority as long as he administered well.<sup>76</sup>

As I have said, historians have long recognized the importance of corporate theory and consent for conciliar thought. Yet, at the same time, they have been reluctant to understand its central importance. In his recent book Francis Oakley writes:<sup>77</sup>

Even after a papal election . . . the fullness of power still in some sense resides in the Church itself as well as the pope. In what precise sense that is so, the complex formulations to which these men resort do not succeed in conveying with total clarity. Given, however, the frequency with which they allude to the procedures normally followed in the more particular ecclesiastical corporations of the day (cathedral chapters, for example), those formulations may well have been clearer to contemporaries than they tend to be to us today.

<sup>73</sup> See most recently the discussion of Francis Oakley, *The Conciliarist Tradition: Constitutionalism in the Catholic Church 1300–1870* (Oxford: Oxford University Press, 2003) 21–22.

<sup>74</sup> Ibid., 39; 45.

<sup>75</sup> Tierney, *Foundations* (ed. 1998) 211.

<sup>76</sup> Ibid., 205.

<sup>77</sup> Oakley, *Conciliarist Tradition*, 79.

To which I reply: "Yes, exactly." Gerson, d'Ailly, Zabarella, Panormitanus, and other conciliarists were steeped in not only the jurisprudence that governed cathedral chapters but also the day-to-day practice of episcopal government. If we wish to understand their thought, we must imagine the same world that they lived in. They lived in a world in which prelates could be negligent. The lower clergy had a right to exercise jurisdiction when a prelate failed in his duties or when issues touched their interests. I think that this world of practice and theory is well illustrated by the long debate over that central text of conciliar history, *Haec sancta*.<sup>78</sup> Francis Oakley has recently argued that the conciliar canon clearly meant to validate the right of a council to exercise authority independently of the pope.<sup>79</sup> However, if we imagine that these conciliarists were steeped in ecclesiastical corporate thought and practice we must conclude, that they always imagined that they acted apart from the pope only under very exceptional and momentary circumstances. When they acted apart from the pope, they exercised temporary jurisdiction. As soon as the immediate problem was resolved, the corporate body became unified again. Consequently when Tierney states that:<sup>80</sup>

*Haec sancta* certainly did not state, and its framers probably never intended to state, that the members of a council, acting in opposition to a certainly legitimate pope, could licitly enforce their will on such a pope in any circumstances.

Oakley objects that this is exactly what the framers of *Haec sancta* intended. The council without the pope could represent the Church too. Yet his interpretation of the canon would violate central canonistic ideas about representation. The prelate (pope) and his chapter (council) represented the diocese (church). When the prelate (pope) failed in his duties the chapter (council) could supplement the prelate's authority. Their unilateral actions were always to be considered exceptional. They could not defy the authority of their prelate without reason or cause (two other legal norms that were deeply embedded in their collective conscious). They never could act independently of each other under normal circumstances.

<sup>78</sup> *Conciliorum oecumenicorum decreta*, ed. Giuseppe Alberigo, Giuseppe A. Dossetti, Claudio Leonardi, and Paulo Prodi. 3rd Ed. (Bologna: Istituto per le Scienze Religiose, 1973) 409–410.

<sup>79</sup> Oakley, *Conciliarist Tradition*, 94–99.

<sup>80</sup> Tierney, "Hermeneutics and History: The Problem of *Haec Sancta*," in *Essays in Medieval History Presented to Bertie Wilkinson*, ed. T.A. Sandquist and Michael R. Powicke (Toronto: University of Toronto Press, 1969) 367.

We will probably debate the exact meaning of *repraesentatio* at Constance and in the medieval conciliar movement for a long time. It is admittedly difficult to understand the unarticulated presumptions of the men who advocated a “conciliar” solution to the problems of the medieval church. There was not a “conciliar party” in the church even in the darkest days of the Great Schism. However, when medieval churchmen were confronted with problems of church governance, they formulated their responses to those problems in the context of their understanding of episcopal corporate governance. Canon law formulated a clear set of procedures that permitted the canons of the cathedral chapter to deal with a negligent bishop. Those procedures were always at the back and embedded in the crevices of every conciliarist’s mind. There is some irony in this story. Medieval canon law created and shaped these ideas of consent and representation that are central to democratic secular institutions around the world today.<sup>81</sup> Yet the role of these norms in ecclesiastical governance is much diminished. One might wonder how Pope Honorius III would react to the fate of his “landmark in the development of representative government.”

<sup>81</sup> Brian Tierney has made the most detailed and sustained argument for the importance of conciliar thought on modern ideas of government in *Religion, Law, and the Growth of Constitutional Thought 1150–1650*. The Wiles Lectures. (Cambridge: Cambridge University Press, 1982).



